UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

SB TOLLESON LODGING, LLC d/b/a BEST WESTERN TOLLESON-PHOENIX HOTEL	)	Case 28-CA-131049
and	)	
LATONYA BEDONIE, an Individual	)	

SB TOLLESON LODGING, LLC'S
POST-HEARING BRIEF

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RESPONDENT'S POST-HEARING BRIEF

Respondent SB Tolleson Lodging, LLC d/b/a Best Western Tolleson-Phoenix Hotel (hereinafter "SB Tolleson" or "Respondent") files its Post-Hearing Brief and respectfully shows the following:

THE PARTIES

SB Tolleson is a limited liability company based in Arizona, which owns and operates a Best Western-branded hotel.

This matter was filed by the General Counsel on behalf of Alleged Discriminatee LaTonya Bedonie ("Bedonie") Bedonie is a former SB Tolleson employee who filed an unfair labor practice charge with the National Labor Relations Board ("NLRB" or "the Board") alleging that SB Tolleson interfered with her rights under Section 7 of the National Labor Relations Act ("NLRA").

INTRODUCTION AND STATEMENT OF CASE

On August 29, 2014, the NLRB issued a Complaint and Notice of Hearing alleging SB Tolleson violated Section 8(a)(1) of the NLRA. The Complaint's primary allegation is that Bedonie engaged in conduct protected under Section 7 of the NLRA "[i]n or about June 2014" "by discussing and concertedly complaining about the treatment employees received by their supervisor." According to the allegations in the Complaint, SB Tolleson subsequently terminated Bedonie on or about June 18, 2014 because of the protected conduct that she allegedly engaged in starting weeks earlier.

In addition to the Complaint's vague allegations concerning Bedonie's termination, the General Counsel also alleges that SB Tolleson, through its Front Desk Supervisor Kasi DeWitt ("DeWitt"), engaged in the following unlawful conduct in violation of Section 8(a)(1) of the Act:

(1) DeWitt threatened employees with discharge if they engaged in protected concerted activities;

(2) DeWitt engaged in surveillance of its employees to discover their protected concerted activities; and

(3) DeWitt created an impression among its employees that their protected concerted activities were under surveillance by SB Tolleson.

SB Tolleson filed an answer to the Complaint on September 12, 2014[1] in which it denied the General Counsel's unfair labor practice allegations and asserted a number of affirmative defenses to the General Counsel's claims. A hearing was held before Administrative Law Judge Amita Baman Tracy in Phoenix, Arizona on December 16 and 17, 2014.

What became even more clear as the Hearing in this case proceeded was that the allegations presented in this case should have never made their way to a complaint. Despite a clear lack of evidence to support any of his allegations, the General Counsel nonetheless decided to proceed with his prosecution of these purported unfair labor practices. Not surprisingly, the General Counsel failed to present *any* evidence at the

[1] SB Tolleson subsequently filed an amended answer on November 20, 2014 in which it again denied the General Counsel's unfair labor practice allegations.

Hearing to establish several necessary elements of his claims against Respondent. For all other elements, the General Counsel relied entirely on the testimony of Bedonie, which was riddled with contradictions and, often, too incredible to be believed.

The General Counsel's termination claim should be dismissed for a number of reasons. In analyzing this claim, it is important to recognize that this is not a case in which the conduct that resulted in Bedonie's termination – an incident occurring on June 18, 2014 – is alleged to be protected under Section 7. The General Counsel does not argue (and certainly would not be able to demonstrate) that Bedonie's conduct on June 18, 2014 falls within the protections of the Act. Rather, the General Counsel's theory appears to be that SB Tolleson's decision to terminate Bedonie on June 18, 2014 following her refusal to clock out on a day that she was not scheduled to work and her subsequent disruptive conduct was pretext for unlawful discrimination. The General Counsel would like the Administrative Law Judge to believe that SB Tolleson was upset because Bedonie had expressed her displeasure over her treatment by newly minted Front Desk Supervisor Kasi Dewitt to a handful of co-workers days and weeks earlier. For the reasons explained below, the General Counsel's theory of the case is completely fantastical and should be rejected.

Significantly, the General Counsel completed failed to establish its *prima facie* case under the framework adopted by the Board in *Wright Line.* First, the evidence failed to demonstrate that Bedonie engaged in protected, concerted conduct under Section 7. At best, Bedonie's testimony shows that she was simply displeased by the "unfair" treatment that she felt she was getting from her supervisor, Kasi DeWitt. This type of "personal

gripe" clearly falls outside of the protections provided by Section 7. Incredibly, it is only downhill from there with respect to the evidence presented by the General Counsel to support the allegation that Bedonie was terminated in violation of Section 8(a)(1).

As Respondent argued at the close of the General Counsel's case-in-chief, the General Counsel completely failed to offer any evidence to establish that the individuals involved in the decision to terminate Bedonie – DeWitt and General Manager Ken Kriske ("Kriske") – had any knowledge of Bedonie's alleged protected, concerted activity. The record is simply *devoid* of any evidence to demonstrate that either DeWitt or Kriske knew that Bedonie allegedly engaged in Section 7 activity. The General Counsel did not even offer up the self-serving testimony of Bedonie on this point. To the contrary, Bedonie acknowledged that each one of her allegedly protected conversations involved one-on-one discussions with her co-workers. Apparently, the General Counsel would like the ALJ to simply ignore this necessary element of his *prima facie* under *Wright Line.* Unfortunately, without knowledge, there can be no showing of an unlawful motive and, therefore, the termination claim fails as a matter of law.

Moreover, even if the General Counsel had established a *prima facie* case (which it did not), SB Tolleson presented substantial evidence to meet its burden to establish that it would have terminated Bedonie even if she had not engaged in protected activity. The evidence clearly demonstrated that SB Tolleson made the decision to terminate Bedonie because of her misconduct on June 18, 2014, which followed numerous performance and attendance issues during Bedonie's short tenure at the Hotel. It is undisputed that Bedonie did not engage in any protected activity on June 18, 2014. Therefore, the

General Counsel seeks to establish his claim by demonstrating that Respondent's legitimate non-discriminatory reason for the termination was pretext for an unlawful motive. However, the General Counsel never produced any evidence to establish a discriminatory motive.

Finally, the General Counsel also failed to establish any of the other alleged unfair labor practices. Bedonie's vague testimony that DeWitt "threatened" her at some point should be discredited based on the credible denial by DeWitt of any threat, as well as the other significant evidence in the record. Moreover, the General Counsel's allegations of surveillance, and that Respondent created an impression of surveillance, are premised entirely on Bedonie's testimony concerning the Hotel's use of surveillance cameras. However, as DeWitt testified at the Hearing, not only did she not have the alleged conversation with Bedonie about surveillance cameras, but she also did not have any access to those cameras or the footage from those cameras. There is simply no merit to any of these additional allegations.

As will be explained in detail below, the evidence presented at the Hearing was compelling, unequivocal and clearly demonstrates that SB Tolleson did not violate the National Labor Relations Act.

STATEMENT OF FACTS

I. BEDONIE'S SHORT, BUT TROUBLED EMPLOYMENT HISTORY AT SB TOLLESON.

SB Tolleson hired Bedonie as a breakfast attendant at its Best Western - branded hotel in approximately April 2014. Throughout her employment at the Hotel, Bedonie

reported to Kasi DeWitt, the Hotel's Front Desk Manager.[2] DeWitt had become a supervisor only a few months earlier and was still very new in the role. [TR 56:15-18, 63:21-24, 113:21-114:3, 205:9-207:20-23][3]

As a breakfast attendant, Bedonie was responsible for overseeing the Hotel's full-service complimentary guest breakfast. Bedonie's shift began at 6:00 a.m. when the guest breakfast started. Bedonie was responsible for making sure that the breakfast bar remained stocked and that guests had what they needed. Following the end of the breakfast at 9:00 a.m., Bedonie was responsible for cleaning up the dining room and preparing for the area for the next day. [TR 114:14-20; 217:23-218:5]

On certain days, Bedonie also served as a housekeeping attendant after she completed her breakfast attendant duties if the Hotel had a sufficient number of guests and needed more assistance in housekeeping. SB Tolleson did not guarantee Bedonie any set number of hours per week. Nor did it provide her with a set schedule. Bedonie's shift was supposed to end at 2:00 p.m. on the days that she stayed to perform housekeeping duties. [TR 223:18-23]

Bedonie experienced a number of performance and attendance issues during her employment at SB Tolleson. Among the issues that her supervisor, DeWitt, spoke to her

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[2] DeWitt, however, did not interview Bedonie for the position. Bedonie was interviewed and hired by Irma Anzar, who was the housekeeping supervisor at the time, and General Manager Ken Kriske. DeWitt did fill out the new hire paperwork for Bedonie. [TR 216:5-217:15; R2]

[3] Citations to the Transcript of the Hearing shall be cited as "TR [page]"; hearing exhibits introduced by Counsel of the General Counsel shall be cited as "GC Exhibit [number]" and exhibits introduced by the Respondent shall be cited as "R Exhibit [number]."

about was her need to arrive on time for her scheduled shift. In early June 2014, DeWitt discovered that Bedonie had clocked in late to work – sometimes very late – on numerous occasions during her employment with the Hotel. DeWitt spoke to Bedonie about her need to start her shift on time, especially since she was responsible for overseeing the Hotel's breakfast, which started promptly for guests at 6:00 a.m. At the time, Bedonie informed DeWitt that Irma Anzar did not provide her with the Hotel's policies and procedures, which described the Hotel's attendance policy, at the start of her employment. DeWitt then provided Bedonie with the policies. DeWitt decided not to discipline Bedonie for her tardiness at the time because she did not think it was fair since Bedonie had not been given the policies, as she should have been. [TR 65, 71:17-72:5, 231; GC2, Ex. 2; GC7; R3]

Bedonie also experienced performance issues during her short tenure at the Hotel. She often failed to meet the Best Western standard for completion of the guest rooms, which required housekeepers to clean a guest room that is occupied in approximately 15-20 minutes and a vacant room in 20-30 minutes. Bedonie also stayed beyond her 8-hour shift to clean rooms with another housekeeper on at least one occasion. At one point, DeWitt left a note for Bedonie on her housekeeping sheet, which stated:

> Please don't state past your end time 8 hr without permission from supervisor when your rooms are done. now both you & Estela would be O.T. – Kasi –

[TR 231:18-237:6, GC2, Ex. 1; R3-4] Although DeWitt spoke to Kriske about disciplining Bedonie for these issues, she did not do so prior to the June 18, 2014 incident that resulted in Bedonie's termination.

II. SB TOLLESON TERMINATES BEDONIE'S EMPLOYMENT BECAUSE OF HER CONDUCT ON JUNE 18, 2014.

As she does every week, DeWitt circulated to the Hotel's staff the employee schedule for the week of June 16, 2014 prior to the start of the workweek. DeWitt then posted the schedule on the employee bulletin board and provided each employee with the schedule on his or her designated clipboard. As the schedule showed, *Bedonie was not scheduled to work on Wednesday, June 18, 2014*. DeWitt scheduled another employee, Lilia Silva, to work as the breakfast attendant on that day. [TR 220:14-223:17, 244:19-245:19, GC2, Ex. 3]

On the morning of June 18, 2014, DeWitt received a phone call on her cellphone from Silva shortly after 6:00 a.m. Silva asked DeWitt why she had scheduled her to come into work as that breakfast attendant on that day if Bedonie was there to perform the job. Of course, Bedonie was in fact not scheduled to work on June 18. DeWitt then called Kriske to inform him of the situation and Kriske told DeWitt that she should send Bedonie home for the day. Therefore, when DeWitt arrived at the Hotel a short while later, she approached Bedonie and explained to her that because she was not scheduled to work that day, she needed to clock out immediately and go home. Rather than clock out, as she was directed to do, Bedonie instead gave Dewitt a hard time and then went to sit on the couch in the Hotel's lobby. DeWitt then approached Bedonie again and told her that she needed to go clock out. After arguing with DeWitt, Bedonie finally went to clock out. [TR 245:20-252:14]

A little while later, Bedonie appeared in the front desk area and demanded DeWitt come over to her to speak to her "right now" because Bedonie wanted to talk to her. DeWitt was training front desk agent, Sharlene Despain, at the time. Therefore, DeWitt calmly reiterated to Bedonie that she already asked her to clock out and go home. Bedonie objected saying that DeWitt could not send her home. DeWitt once again explained to Bedonie that she was sending her home from work because Bedonie was not scheduled to work that day. DeWitt also told Bedonie that if she did not agree with her decision to send her home, she should contact Kriske. Bedonie then slammed the office door, called DeWitt a "f---ing bitch," and said this is "why nobody likes you around here." Bedonie then left the Hotel. At the time, there was at least one, but possibly two, guests in the lobby. [*Id.*]

DeWitt called Kriske and described to him her interaction with Bedonie. Based on Bedonie's conduct on June 18, 2014, DeWitt and Kriske made the decision to terminate her employment. DeWitt subsequently called Bedonie to inform her about her termination. SB Tolleson processed Bedonie's termination the following day, June 19, 2014. [*Id*; 27:6-29:1]

ARGUMENT

I. THE GENERAL COUNSEL DID NOT MEET HIS BURDEN TO DEMONSTRATE THAT BEDONIE WAS TERMINATED FOR ENGAGING IN CONDUCT PROTECTED BY SECTION 7 OF THE NLRA.

Under the *Wright Line* framework adopted by the NLRB, the General Counsel must initially make a *prima facie* showing sufficient to support the inference that protected conduct was a substantial or motivating factor in the employer's decision to

discipline, discharge, or enforce its work rules. *Wright Line*, 251 NLRB 1083 (1980), *enf'd* 662 F.2d 899 (1st Cir. 1981). *See also NLRB v. Transportation Mgt.*, 462 U.S. 393, 399 (1982); *Amoco Fabrics Co.*, 260 NLRB 336, 344 (1982). To establish a *prima facie* case under *Wright Line* and its progeny, the General Counsel has the burden to prove that (1) the discriminatee's actions were concerted, (2) the decisionmaker knew about the concerted activity, (3) the discriminatee's actions were engaged in for the mutual aid or protection or were otherwise protected by Section 7 of the Act, and (4) the discriminatee's participation in protected, concerted activity was a substantial or motivating reason for the adverse employment action. *See, e.g., Amelio's*, 301 NLRB 182 (1991), *citing Meyers Industries*, 268 NLRB 493 (1984), *remanded sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied* 474 U.S. 948, 971 (1985), *on remand* 281 NLRB 882 (1986), *affd. sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988).

If the General Counsel succeeds in creating a presumption that the adverse action violated the Act, the employer then bears the burden to prove that the same action would have taken place even in the absence of the protected conduct. *Id.* To rebut the presumption, an employer "must only show that it reasonably believed" that the employee engaged in conduct warranting the adverse employment action. *Jordan Marsh Stores Corp.*, 317 NLRB 460, 476 (1995), *GHR Energy Corp.*, 294 NLRB 1011, 1012-13 (1989), *aff'd*, 924 F.2d 1055 (5th Cir. 1991).

Further, if Respondent establishes its affirmative defense, the General Counsel bears the burden of rebutting the defense. If Respondent "goes forward" with evidence

supporting its affirmative defense, the General Counsel "is further required to rebut the employer's asserted defense by demonstrating that the challenged adverse action would not have taken place in the absence of the employee's protected activities." *Comcast Cablevision*, 313 NLRB 220, 253-54 (1993); *St. Luke's Hospital*, 312 NLRB 425, 439 (1993). Even if a disciplinary action appears extreme, it does not follow that the proffered reason for the action is pretextual. Simply put, if an improper motive is not involved, the question of proper discipline of an employee is a matter "left to the discretion of the employer" which may discharge an employee for "a good reason, a bad reason, or no reason at all." *Gossen Company*, 254 NLRB 339, 355 (1981), *enforced in part, denied in part*, 719 F.2d 1354 (7th Cir. 1983); *NLRB v. Meinholdt Manufacturing, Inc.*, 451 F.2d 737, 739 (10th Cir. 1971). *See also, Goldtex, Inc. v. NLRB*, 14 F.3d 1008, 1011 (4th Cir. 1994) ("[u]nwise and even unfair decisions to discharge employees do not constitute unfair labor practices unless they are carried out with the intent of discouraging participating in union activities"); *West Covina Disposal*, 315 NLRB 47, 64 (1994) (deferring to employer's "business judgment" that employee should be discharged). As such, "it is not for the Board to substitute its judgment for that of an employer in deciding what are good or bad reasons" for taking an adverse action. *Kellwood Company*, 299 NLRB 1026, 1040 (1990); *Central Freight Lines*, 255 NLRB 509, 510 (1981), *enforced*, 666 F.2d 238 (5th Cir. 1982). *See also Ryder Distribution Resources, Inc.*, 311 NLRB 914, 816 (1993).

As discussed fully below, the General Counsel failed to satisfy even his initial burden under *Wright Line*. To begin with, he failed to offer any evidence that the individuals involved in the decision to terminate Bedonie's employment – Kasi DeWitt and Ken Kriske – had any alleged knowledge of her participation in any protected, concerted activities. Moreover, even if they had been aware of any such activities, the overwhelming evidence demonstrates that the decision to terminate Bedonie was for a legitimate, non-discriminatory reason wholly unrelated to any Section 7 activity. Even if the General Counsel could get beyond the substantial deficiencies in his case-in-chief, he did not introduce any evidence to demonstrate that SB Tolleson's decision to terminate Bedonie for her conduct on June 18, 2014 was pretextual.

A. The Evidence Offered by the General Counsel Failed to Demonstrate that Bedonie Engaged in Conduct Protected by Section 7 of the Act.

As with all of the other elements of its case, the only evidence introduced by the General Counsel to demonstrate that Bedonie engaged in Section 7 activity was Bedonie's own self-serving testimony. At the Hearing, Bedonie only testified to a handful of conversations that she had with co-workers about her personal displeasure with the treatment *she faced* at the hands of her supervisor, Kasi DeWitt. For the reasons explained below, these conversations do not fall within the protections of the Act.

Section 7 of the NLRA protects the rights of employees "to engage in … concerted activities for the purpose of collective bargaining or other mutual aid or protection." Protected, concerted activities are those pursued by employees in a peaceful manner in the exercise of their Section 7 rights. Therefore, to be protected under Section

7, employee activity must be both "concerted" in nature and pursued either for union-related purposes aimed at collective bargaining or for other "mutual aid or protection." In determining the scope of the protections afforded by Section 7, the Board has long recognized the need to balance those protections against the legitimate interests of employers. *See, e.g., Republic Aviation Corp*., 324 U.S. 793 (1945).

The General Counsel's case appears to be based primarily on three conversations that Bedonie claims to have had with co-workers at various points in late May and early June. Bedonie provided scant details about each of these conversations. However, it is abundantly clear from Bedonie's testimony that she was concerned about one thing and one thing only: *her own treatment by DeWitt*. This type of "personal gripe" is not the type of conduct that is protected by Section 7.

Specifically, Bedonie testified at the Hearing to the following three conversations:

- May 31, 2014: Bedonie testified that she had a conversation with a co-worker named Gene while the two of them were driving in Respondent's shuttle van. In describing her conversation with Gene, Bedonie testified that they discussed: "Getting – *me having issues* – or me and Gene talking about getting treated unfair by Kasi." [TR 116:11-117:1 (emphasis added)] She then went on to testify simply that Gene told her that he felt DeWitt was "no good and he felt that she was racist." [*Id.*]
- June 2, 2014: According to Bedonie, she had a conversation with an employee named Diana about "[i]ssues about Kasi." [TR 117:25-118:25] Bedonie

further testified that Diana told her that Bedonie should "go ahead and talk to Lucy if [Bedonie] had any problems." [*Id.*]

- June 9, 2014: Bedonie testified that she had a second conversation with Diana about "Kasi mistreating – mistreatments." [TR 124:14-125:3] In response, Bedonie testified that Diana allegedly told her that she thought she may get "in trouble" if they continued talking. [*Id*.] Bedonie did not testify that Diana agreed with her complaints regarding her mistreatment or had experienced similar mistreatment.

In *Prill v. NLRB*, the D.C. Circuit Court of Appeals discussed the scope of individual activity that qualifies as "concerted" under the NLRA. *Prill*, 835 F.2d 1481, 1484 (D.C. Cir. 1987) *cert. denied*, 487 U.S. 1205 (1988). According to the court in *Prill*, individual activity is concerted where it "seek[s] to initiate or induce or to prepare for group action." *Id.* (citation omitted). Moreover, the Board has explained the limits of "concerted" activity as follows:

> In general, to find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself…

Meyers Industries, 268 NLRB 493 (1984), *remanded sub nom., Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 948, 971 (1985), *on remand*, 281 NLRB 882 (1986), *affd. sub nom., Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988). Thus, to constitute "concerted" activity, the employee "must be actually, rather than impliedly, representing the views of other employees." *See*

Manimark Corp. v. NLRB, 7 F.3d 547 (6th Cir. 1993), *citing, Jim Causley Pontiac v. NLRB*, 620 F.2d 122, 126 n.7 (6th Cir. 1980).

Based on Bedonie's testimony regarding her conversations with Gene and Diana, one cannot conclude that her conduct was "concerted" activity "for the purpose of … mutual aid or protection." To the contrary, Bedonie's testimony clearly demonstrates that she was talking to employees about *her own perceived mistreatment by DeWitt.* While Bedonie claims that Gene responded to the issues she raised concerning her treatment by DeWitt by calling DeWitt "no good" and a "racist," she did not testify that her action was intended to "seek to initiate or induce or to prepare for group action" and there is no evidence in the record suggesting that it was. Moreover, Bedonie's testimony concerning her two conversations with Diana once again demonstrates that Bedonie was focused on her own perceived mistreatment and not any greater purpose.

Bedonie also testified about two separate conversations that she had with an employee named Lucille Jones – neither of which included any form of protected, concerted activity. [TR 120:3-15, 125:4-25] First, Bedonie testified to a conversation with Jones on June 4, 2014 in which Jones simply told her that she needed to clock out and that Bedonie was now part-time. [TR 120:3-15] *Bedonie did not testify to making any statements during this conversation.* Bedonie also testified to a conversation that she had with Jones on June 10, 2014. According to Bedonie, DeWitt sent Jones out to the parking lot to talk to Bedonie after she saw Bedonie crying. [TR 125:4-25] During this conversation, Bedonie claims the "subject of mistreatment" came up and Jones commiserated with Bedonie telling her that she had "also got mistreated and Kasi also

made her cry too when she first started." [*Id.*] This is not protected, concerted activity under Section 7. Once again, Bedonie was not seeking to initiate group action, but instead was complaining to a co-worker regarding her own perceived mistreatment by DeWitt.

Finally, Bedonie briefly testified to a one-on-one conversation that she had with General Manager Ken Kriske on approximately June 11, 2014. During this conversation, Bedonie claims that she told Kriske "about how [DeWitt] was treating [her] on a daily basis." [TR 126:1-19] Bedonie's testimony demonstrates that she was concerned only about her own problems with DeWitt. Bedonie's conversation with Kriske is no different than the inquiry made by the employee in *Manimark Corp. v. NLRB*, 7 F.3d 547 that was found not to be concerted. In *Manimark*, the court found that the Board's determination that an individual employee, Hurley Fields, was engaged in concerted activity when he spoke to management concerning his personal dissatisfaction with wages, hours and other working conditions was *not* supported by substantial evidence. *Manimark*, 7 F.3d at 550. The court found that there was no connection between other employees and Fields merely because Fields may have made complaints that were matters of concern to both him and the group. *Id*. The court noted that the conversation between Fields and management regarding wages occurred when Fields went to a manager's office alone, and only came about when he objected to a change in his own commission. *Id*. The court found that the conclusion that Fields was acting concertedly was further undermined because there was no evidence that he had ever told any of the other employees of his intended actions or

made complaints on their behalf. *Id*; *see also, Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988).

The General Counsel simply failed to meet its burden to establish that Bedonie had engaged in any conduct protected under Section 7 of the Act.[4]

B. The Record Contains No Evidence to Establish that SB Tolleson Had Any Knowledge of Bedonie's Allegedly Protected Conduct under Section 7.

Even if the General Counsel had established that Bedonie had engaged in protected, concerted activities under Section 7 based on her testimony regarding the handful of conversations that she had with co-workers about her perceived mistreatment by DeWitt in the weeks prior to her termination, *the General Counsel cannot escape the fact that neither DeWitt or Kriske had any knowledge of Bedonie's protected, concerted activities.* Absent evidence that the decision-makers had any knowledge that Bedonie engaged in Section 7 activities, the General Counsel simply cannot demonstrate that the decision to terminate Bedonie was unlawfully motivated. In cases involving retaliation, it has been widely recognized that a causal connection cannot be established in the absence of evidence that the actual decision-maker responsible for the adverse action was aware of the employee's protected activity. For example, in *Sears, Roebuck & Co. v. NLRB*, 349 F.3d 493 (7th Cir. 2003), the Seventh Circuit of Appeals denied enforcement of a

[4] The facts of this case are a far cry from the facts presented in the *Avalon-Carter Community Center* case cited to by Counsel for the General Counsel in his opening statement at the Hearing. *Avalon-Carter Community Center*, 255 NLRB 1064 (1981). Unlike here, the alleged discriminate in that case engaged in extensive conduct that included the preparation and presentation of a grievance -- the subject matter of which was sharply critical of the performance and the attitude of one of the Respondent's supervisors – with numerous co-workers. The handful of conversations that Bedonie purportedly had about her displeasure with DeWitt are very different from the conduct at issue in *Avalon-Carter Community Center.*

Board order against Sears because it found that "[f]or purposes of the prima facie case under §§ 158(a)(1) and (a)(3), an employer can only be said to know of the employee's protected activities through the decisionmaker…As to Graettinger, the decisionmaker who fired Hepburn, nothing in the ALJ's opinion (or the record, as far as we can tell) provides any indication that he knew that Hepburn made any pro-union comments at the meeting."

In the instant case, the General Counsel offered no evidence – direct or circumstantial - that either DeWitt or Kriske had any knowledge of the specific conversations that it claims constituted Bedonie's protected, concerted activities. Significantly, Bedonie consistently testified that she and her co-worker were the only individuals present during each one of the conversations described above. [TR 116:18-19; 118:5-5; 124:20-21] Moreover, both DeWitt and Kriske credibly denied that they had any knowledge of Bedonie's alleged protected, concerted activities prior to making the decision to terminate her employment on June 18th:

Q (Counsel for SB Tolleson): You testified that you approved Ms. Bedonie's termination, is that correct?

A (Kriske): Yes, sir.

Q: Did you approve it based on the information that you received from Ms. DeWitt on the day of the termination?

A: Yes, sir.

Q: And that day was June 18th, 2014?

A: I believe that's correct.

Q: At that point in time did you have any knowledge that Ms. Bedonie had complained about treatment by Ms. Stewart[5] to any other employee?

A: *No.*

Q: At that point in time did you have any knowledge that Ms. Bedonie had raised any other issue about the terms and conditions of her employment to any other employee?

A: *No, sir.*

[TR 52:7-22 (emphasis added)] DeWitt also denied any knowledge of Bedonie's conversations with her co-workers:

Q (Counsel for SB Tolleson): Ms. DeWitt, prior to June 18th did you have any knowledge of Ms. Bedonie having any conversations with any other employees regarding your supervision?

A (DeWitt): *No, I did not.*

[TR 252:18-21 (emphasis added)] There is no evidence in the record to establish that either DeWitt or Kriske had knowledge of Bedonie's purported Section 7 activities.

To the extent that the General Counsel seeks to establish this critical element of its *prima facie* case through its allegation that SB Tolleson was engaging in unlawful surveillance, the General Counsel's theory falls flat. First, this theory is premised on a single statement Bedonie claims DeWitt made on June 9, 2014. However, Bedonie's testimony regarding this conversation with DeWitt lacks credibility and should be disregarded. Significantly, despite providing an affidavit to the Board Agent on July 9, 2014 in which she provided a detailed description of her interaction with DeWitt on June

[5] The transcript mistakenly references a "Ms. Stewart," However, there is no "Ms. Stewart" involved in this case and the question related to "Ms. DeWitt."

9, Bedonie failed to make any mention of DeWitt's alleged "threat" or DeWitt's statement that she was watching her on the Hotel's surveillance cameras and had caught her on a recording. [TR 152:2-5] Bedonie only made this allegation for the first time when she submitted her second affidavit on August 6, 2014 – over a month and a half after her termination. Bedonie presumably had multiple interactions with Board personnel in the period between submission of her first and second affidavits, which may provide the explanation for the sudden addition of these new details.

Moreover, DeWitt credibly denied making any comments to Bedonie regarding the Hotel's surveillance cameras. [TR 228:23-229:5] More importantly, however, DeWitt explained that she had never operated the Hotel's surveillance cameras herself *and did not have access to the footage from the cameras,* which could only be viewed in the manager's office. [TR 227:16-228:22] *Finally, DeWitt testified that the surveillance cameras do not provide any audio.* [TR 228:21-22; 262:16-22]

The General Counsel's theory that DeWitt may have seen Bedonie talking to other employees on SB Tolleson's surveillance cameras is based entirely on speculation and is not supported by the evidence in the record.[6] Moreover, it is undisputed that the cameras did not provide audio, so even if DeWitt did have access to the footage from the cameras (which she did not), she would not have been able to determine whether Bedonie was engaging in any conduct protected by Section 7 by simply viewing the footage. Finally, the General Counsel did not even attempt to show that DeWitt was viewing footage from

[6] Significantly, at least one of the conversations – Bedonie's discussion with Gene on May 31, 2014 – occurred in the Hotel's shuttle van far away from any surveillance cameras.

the surveillance cameras in the areas that Bedonie was talking to co-workers on the handful of days at issue.

Because there is absolutely no evidence in the record to establish that the individuals (DeWitt and Kriske) who were involved in the decision to terminate Bedonie's employment had any knowledge of her purported protected, concerted activity, the General Counsel's allegation relating to Bedonie's termination should be dismissed.

C. Even if the General Counsel Had Presented Evidence to Establish a *Prima Facie* Case for Bedonie's Termination (Which He Has Not), the Evidence Demonstrates that SB Tolleson Had a Legitimate, Non-Discriminatory Reason for Bedonie's Termination.

Even if the General Counsel had met his threshold burden of establishing a *prima facie* case (which he did not), the evidence demonstrates beyond any serious question that SB Tolleson would have terminated Bedonie based on her wholly unprotected conduct on June 18, 2014. There was overwhelming testimony introduced concerning Respondent's legitimate, business reason for terminating Bedonie, which largely went undisputed. Frankly, for the most part, the evidence as to what motivated SB Tolleson's decision to terminate Bedonie does not even raise credibility disputes. As will be explained below, Bedonie admitted that she came to work on a day that she was not scheduled, initially refused to leave, and loudly told DeWitt that she was a "f---ing bitch" while at least one Hotel guest was present in the lobby. To the extent that any credibility issues were raised, however, the testimony of the Bedonie should be rejected based on her complete lack of credibility.

Significantly, DeWitt provided credible testimony to demonstrate that SB Tolleson's decision to terminate Bedonie was based on Bedonie's conduct on June 18, 2014.[7] Specifically, DeWitt testified that she called Kriske and made the decision to terminate only after Bedonie refused to leave the Hotel after being informed that she was not scheduled to work that day:

> Q (Counsel for Respondent): And at that point did you call Mr. Kriske?
>
> A (DeWitt): Yes.
>
> Q: And what happened at that point in time?
>
> A: I told him what happened. He asked me what had happened. I told him I got there. I asked her to clock out. She gave me a hard time. That she did clock out. She said she wanted to talk to me. I told her she needed to go home. She could call you. She called me a fucking bitch, walked out. And he said okay. Go ahead and fire her.
>
> Q: And that was the first time that that decision to fire her was made?
>
> A: Yes, I had talked to him many times about it, but that was the only decision he had – that's the time he had made the decision.
>
> Q: Okay. And did you communicate to her the fact that she was fired before she left?
>
> A: No.
>
> Q: And when did you communicate that to her?
>
> A: I called and let her know that we were no longer going to need her. We were going to let her go and she could drop off her uniforms and pick up her checks, her last checks in a couple of days.

[7] Again, it is important to point out that the General Counsel has not argued that Bedonie engaged in any form of protected, concerted activity on the date of her termination, June 18, 2014.

[TR 250:22 – 251:18] DeWitt's asserted reason for Bedonie's termination was corroborated by the testimony of Kriske. Although Kriske did not witness the incident because he was not present at the Hotel at the time of the June 18, 2014, he spoke to DeWitt by telephone for the second time shortly after the incident unfolded. It was during this call that the decision to terminate Bedonie was made.

Although Bedonie disputes the sequence of the events that occurred on June 18, 2014, she does not deny engaging in the conduct that resulted in her termination. Significantly, Bedonie admits that the schedule did not have her working on Wednesday, June 18, 2014. Instead, Bedonie claims that she did not look at the schedule that week because, in her words, she always worked on Wednesdays. Nonetheless, Bedonie acknowledged that it was her responsibility to review the schedule each week to see what days she was scheduled to work. [TR 142:9-19] Bedonie also admits that, after DeWitt told her to clock out and leave on June 18th, she told DeWitt that she was "fucked up" and that she was a "fucking bitch." [TR 131:7-8] Bedonie further acknowledges that there was at least one guest in the lobby at the time. [TR 130:17-19]

The General Counsel claims that DeWitt communicated her decision to terminate before Bedonie directed the profanities to her. Although Bedonie's argument is irrelevant in light of the General Counsel's failure to establish its *prima facie* case, the argument is also not supported by the weight of the evidence in the record. Bedonie's testimony is contradicted not only by the testimony of DeWitt and Kriske but also the testimony of Sharlene Despain, a front desk agent who was at the Hotel training that day. Specifically, Despain testified that Bedonie was argumentative in response to DeWitt's

request that she clock out on June 18, 2014 and that, in fact, Bedonie refused to clock out. [TR 195:13-18] She also heard Bedonie call DeWitt a "f---ing bitch." [TR 196:7-14] Finally, Despain, who was only a few feet away from Bedonie and DeWitt during the interaction, also testified that she did not hear DeWitt terminate Bedonie prior to Bedonie leaving for the day. [TR 196:1-6]

The General Counsel will inevitably attempt to demonstrate that SB Tolleson's asserted reason for Bedonie's termination is pretextual. However, because it has failed to establish the critical element of knowledge, the General Counsel's pretext arguments are irrelevant. Nonetheless, the General Counsel has not produced sufficient evidence to "rebut the employer's asserted defense by demonstrating that the challenged adverse action would not have taken place in the absence of the employee's protected activities." *Comcast Cablevision*, 313 NLRB 220, 253-54 (1993).

The fact that SB Tolleson referenced Bedonie's history of performance and attendance issues in its termination paperwork does not establish pretext. Neither does Respondent's failure to have formally disciplined Bedonie prior to her termination. As DeWitt testified, during Bedonie's tenure at the Hotel, she was a new supervisor who had an overwhelming amount of responsibilities. She also worked under a general manager, Ken Kriske, who did not spend a significant amount of time at the Hotel because he was also working on other projects for the Hotel's owner. Moreover, DeWitt testified that she was going to discipline Bedonie in early June after she discovered that Bedonie had been tardy on numerous occasions, but chose not to after learning that Bedonie had not been given Respondent's policies at the start of her employment as she should have been.

Rather than demonstrating pretext, this evidence shows that DeWitt was a fair manager who did not harbor any animus towards Bedonie even after Bedonie allegedly had begun engaging in protected, concerted activity, relating to DeWitt's supervision.

SB Tolleson has produced substantial and overwhelming evidence to demonstrate that it had a legitimate, non-discriminatory reason to terminate Bedonie. As the evidence clearly establishes, even if DeWitt or Kriske had been aware of Bedonie's Section 7 activity (which they were not), Respondent would have still terminated Bedonie's employment based on her wholly unprotected conduct on June 18, 2014.

II. THE GENERAL COUNSEL'S OTHER SECTION 7 ALLEGATIONS SHOULD ALSO BE DISMISSED.

In addition to the General Counsel's allegation regarding Bedonie's discharge, the Complaint also alleges that SB Tolleson interfered with Bedonie's Section 7 rights by (1) threatening Bedonie, (2) engaging in unlawful surveillance of Bedonie, and (3) by creating the impression that Bedonie's activities were under. The General Counsel has failed to present sufficient evidence to establish any of these alleged Section 7 violations.

A. DeWitt Credibly Denied Threatening Bedonie During their June 9, 2014 Meeting.

In Paragraph 4(b) of the Complaint, the General Counsel alleges that, since June 9, 2014, DeWitt threatened SB Tolleson's "with discharge if they engaged in protected concerted activities." [Complaint at ¶ 4(b)] In support of this allegation, Bedonie testified that on or about June 9, 2014, while meeting with DeWitt regarding her chronic absenteeism, DeWitt said to her: "If I catch you talking to other employees about me

again, you're fired." [TR 123:1-3] According to Bedonie, DeWitt knew that she was talking to other employees *about* her because DeWitt had "been watching [her] in the cameras and [DeWitt] had caught [Bedonie] on recording." [TR 123:3-4]

As explained above, DeWitt steadfastly denied having threatened Bedonie during their June 9, 2014 meeting. [TR 229:1-3] Bedonie's testimony about the purported threat should also be discredited because it was mysteriously missing from the lengthy and detailed affidavit that she had provided to the Board Agent on or about July 9, 2014 – just a month after her meeting with DeWitt took place. In her July 9th affidavit, Bedonie provided a detailed description of the June 9th meeting in which the threat allegedly was made, but makes no mention of DeWitt threatening her or making any statements concerning SB Tolleson's surveillance cameras. Bedonie only made these very detailed allegations for the first time when she submitted her second affidavit to the Board on or about August 6, 2014 – almost two month after the meeting took place.

Moreover, Bedonie's testimony concerning the alleged threat is further discredited by her claim that DeWitt made a statement to her that DeWitt was watching Bedonie on the Hotel's surveillance cameras. As will be explained below, not only did DeWitt deny making any such statement, but it is also undisputed that DeWitt did not have the ability to operate the surveillance cameras or to view its footage at any time during Bedonie's employment at the Hotel.

Based on the weight of the credible evidence in the record, SB Tolleson respectfully requests that the General Counsel's allegation concerning DeWitt's alleged threat to Bedonie be dismissed.

B. The Credible Evidence in the Record Does Not Support the General Counsel's Allegations of Unlawful Surveillance or that SB Tolleson Created the Impression of Surveillance.

The General Counsel's allegations that SB Tolleson engaged in unlawful surveillance and created the impression of unlawful surveillance should be dismissed for all of the reasons described above in Section II.A. However, in addition to these reasons, the allegations should also be dismissed because they simply do not comport with the evidence contained in the record. Not only did DeWitt deny ever telling Bedonie about the cameras, she also testified that she never operated the Hotel's surveillance cameras herself *and did not have access to the footage from the cameras during the period at issue.* According to DeWitt, the video footage could only be viewed in the manager's office by an authorized person who had a password. She did not have the password or access to the office. [TR 227:16-228:22] *However, even if she had access to the footage, the surveillance cameras did not have audio capabilities.* [TR 228:21-22; 262:16-22] Therefore, DeWitt would not be able to determine the substance of any conversation that may have been captured by the video.

The General Counsel simply failed to present credible evidence to establish either of these allegations. Based on the evidence in the record, it is much too far of a stretch to believe that DeWitt would have made the alleged statements to Bedonie regarding the surveillance cameras.

CONCLUSION

The General Counsel has not established Bedonie engaged in concerted activity, that SB Tolleson knew she engaged in concerted activity, or that protected concerted

activity was a motivating factor in her termination. Even if the General Counsel had done so (which he did not), SB Tolleson has established the affirmative defense that it would have taken the same action in the absence of protected conduct. Finally, the General Counsel failed to satisfy his burden to establish any of the other unfair labor practice allegations contained in the Complaint. Therefore, the General Counsel's Complaint against SB Tolleson should be dismissed in its entirety.

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